

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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TWANA ADAMS, et al.,  
Plaintiffs,  
- against -

NEW YORK STATE EDUCATION  
DEPARTMENT, et al.

Defendants.

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CASE NO. 08 Cv. 5996 (VM) (AJP)

**DECLARATION OF  
NICHOLAS A PENKOVSKY, ESQ.  
IN OPPOSITION TO DEFENDANTS'  
MOTION FOR RULE 11 SANCTIONS**

I, NICHOLAS A. PENKOVSKY, declare and state:

1. I am an attorney admitted to practice in the states of New York and New Jersey, the United States District Courts for the Southern and Eastern Districts of New York and the District of New Jersey and the United States Courts of Appeals for the Second and Ninth Circuit.

2. I am the attorney of record for the plaintiffs Michael Ebewo, Joann Hart, Julianne Polito, Thomasina Robinson and Brandi Scheiner in this lawsuit ("Penkovsky Plaintiffs"). If called upon to testify, I would testify competently to the facts set forth herein.

3. I make this Declaration in Opposition to the motion by defendants for Rule 11 sanctions.

4. On September 23, 2009, I filed a Notice of Appearance of Counsel in this case.

5. At the time I represented all seven plaintiffs after a period of time in which they had been self represented.

6. Shortly thereafter Ms. Cruz and Ms. Adams retained Joy Hochstadt as counsel.

7. Ms. Hochstadt and I worked on this case together until after the filing of the Fourth Amended Complaint.

7. The Fourth Amended Complaint was filed at the request of Judge Marerro and

was to be filed within thirty days of his order, and was done so.

8. Shortly thereafter on or about June 26, 2010 at the advice of ethics counsel consulted by Mr. Penkovsky, Penkovsky Plaintiffs sought leave to sever their claims from the other plaintiffs. Leave was peremptorily denied with the admonition that in all likelihood any motion would be denied.

9. I have practiced law for nearly seventeen years without sanction or other blemish.

10. I have represented numerous clients in New York and New Jersey State Courts and Federal Courts in New York and California, including the Second and Ninth Circuit Courts of Appeal.

11. I graduated with honors from New York Law School 4 months shy of my fortieth birthday and received the Woodrow Wilson Award and the American Jurisprudence Award for Constitutional Law. Among my cases is *Greifenberger v. Hartford Life Insurance Co., et al.*, Docket No. 04 - 0385-cv, on appeal to the Second Circuit Court of Appeals and in a Petition to that Court for a rehearing *En banc*, an ERISA case in which I argued that the Second Circuit Court of Appeals should modify Second Circuit law to conform with the law of other circuits in construing the requirement of exhaustion of administrative remedies when an insurance contract might mislead the claimant for disability benefits. Although unsuccessful, I was not sanctioned for seeking a modification of the law.

12. Defendants' counsel seeks an extraordinary amount of time for briefs that were basically edits of the prior briefs filed in this lawsuit. The previous sanction was based upon a refiling of a voluntarily dismissed case pursuant to Fed. R Civ. P. 41 and has no precedential value. As I previously stated in briefs, that sanction was inappropriate in that the *pro se* plaintiffs

were misdirected by the court's language that they should drop their motion to sever and could bring the same claims in another lawsuit.

13. Given the voluminous briefing in this case it is clear that the piggy-back or single filing rule has been ignored, despite its application in this District to other similar lawsuits.

14. I conducted voluminous research in this case and consulted numerous treatises and pleading manuals modifying pleadings published by Haig and Thomson-West to draft appropriate pleadings. I am prepared to produce those materials at the conclusion of this lawsuit to avoid privilege issues to demonstrate to the court the legal work and inquiry I undertook. I also held numerous meetings with my clients and reviewed their documents to prepare their pleadings.

15. Rule 11 sanctions are entirely inappropriate in this lawsuit.

I declare under the penalty of perjury under the laws of the United States of America and the State of New York that the foregoing is true and correct and that this Declaration was executed on November 3, 2010 in Riverdale, New York.

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/Nicholas A. Penkovsky/

Nicholas A. Penkovsky NP-0134

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